

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

SERGIO MORALES,

Plaintiff,

v.

WILLIAM DONNELLY, et. al.,

Defendants.

Case No. 3:16-cv-00371-MMD-WGC

**REPORT & RECOMMENDATION OF  
U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4, for a recommendation on Plaintiff's Motion for Preliminary Injunction. (Electronic Case Filing (ECF) No. 1-3.)

**I. BACKGROUND**

Plaintiff, is a prisoner in custody of the Nevada Department of Corrections (NDOC), proceeding pro se in this action on his Amended Complaint. (ECF No. 6.) The events giving rise to this action took place while Plaintiff was housed at Lovelock Correctional Center (LCC). The court screened the Amended Complaint and allowed Plaintiff to proceed with an Eighth Amendment deliberate indifference to serious medical needs claim in Count I, and parallel claim under Article I, Section 6 of the Nevada Constitution, against Dr. William Donnelly, Donald Poag, Dr. Robert Bannister, James Cox and Brian Egerton (mistakenly named by Plaintiff as Edgerton). (ECF No. 9.) The Amended Complaint also names John/Jane Doe NDOC pharmacy employees, a John Doe correctional officer, John Doe(s) grievance responder(s), and the warden at LCC. (ECF No. 6 at 3.)<sup>1</sup>

<sup>1</sup> The Attorney General's Office has filed a limited notice of appearance on behalf of Cox and Egerton. (ECF No. 11.) It advised that Dr. Donnelly, Dr. Bannister, and Poag are no longer employed by NDOC and have not requested representation; as such, it filed their last known addresses under seal. (*Id.*) Judge Du directed the Attorney General's Office to send a letter to the former employees at their last known address and asking if they want the Attorney

1 In the Amended Complaint, Plaintiff alleges that Dr. Donnelly refused to treat his  
2 cholesterol issue, and that his prescription refills were repeatedly late due to the deficient policies  
3 and procedures of the prison, its medical department and pharmacy. He contends that his  
4 grievances on this issue were ignored or inadequately addressed. He eventually suffered a heart  
5 attack, which he attributes to the untimely receipt of his prescription medications and  
6 Dr. Donnelly's failure to treat his elevated cholesterol. He required surgery where two stents  
7 were placed in his heart. He claims that the attending physician instructed him to follow his  
8 medication orders, but he avers that his refills have continually been late or ignored.

9 When it screened the Amended Complaint, the court also directed Defendants to respond  
10 to a motion for temporary restraining order (TRO) and preliminary injunction (PI) Plaintiff filed  
11 along with his original complaint. (ECF No. 1-3.) The motion for TRO/PI sought an order  
12 protecting him from any future delay in receipt of his medication. (*Id.*) Defendants filed a  
13 response to Plaintiff's motion for TRO/PI on July 27, 2016. (ECF No. 14.) Plaintiff filed a reply  
14 brief in support of his motion. (ECF No. 16.)

15 On August 11, 2016, District Judge Du granted Plaintiff's motion for a TRO, finding  
16 Plaintiff had demonstrated a likelihood of success on the merits of his deliberate indifference  
17 claim "based on his inability to obtain his refill medication in a timely manner;" that he is likely  
18 to suffer irreparable harm in the absence of temporary relief; that the balance of equities tips in  
19 his favor; and that it is in the public interest "to ensure that inmate's receive adequate health care  
20 and medication in a timely manner." (ECF No. 17 at 4.) Judge Du directed Defendants to  
21 promptly refill Plaintiff's medication within thirteen (13) days to prevent him from suffering a  
22 lapse in his daily medication. (*Id.* at 5.) She required that Plaintiff continue to request refills in  
23 his medication at least thirteen days before his medication is set to run out, and to keep  
24 documentation of his requests. (*Id.*) In the event Defendants failed to provide him with his refill  
25 within thirteen days of his request, he is permitted to move the court for monetary sanctions  
26 against Defendants. (*Id.*) The TRO applies to the named Defendants as well as their officers,

27 General's Office to represent them in this matter, and to advise the court of their response. (ECF No. 9 at 8-9.) To  
28 date, the court has not been advised of their response. In any event, service will be addressed following the early  
mediation conference which has been scheduled for October 18, 2016. (*See* ECF No. 18.)

1 agents, servants, employees and attorneys. (*Id.*) The TRO was set to expire after fourteen days,  
2 and Judge Du referred the matter to the undersigned to set a hearing at the earliest possible time  
3 and provide a report and recommendation on whether District Judge Du should grant Plaintiff's  
4 motion for a PI. (*Id.* at 6.)

5 The undersigned set the matter for a hearing on August 24, 2016, and directed  
6 Defendants to file the relevant records under seal (including treatment records, progress notes,  
7 physicians' orders, pharmacy records, medication logs, kites and grievances) that pertain to  
8 Plaintiff's allegation that he experienced delays in receiving his medications, along with NDOC  
9 policies concerning pharmacy procedures on prescription refills. (ECF No. 20.) Defendants were  
10 to ensure Plaintiff be provided a reasonable opportunity to review these documents in advance of  
11 the hearing. (*Id.*) Defendants were further directed to make the current medical director or  
12 another person with meaningful knowledge of NDOC's pharmacy policies available, at least by  
13 telephone, to provide any necessary testimony at the hearing. (*Id.*)

14 Defendants filed the relevant records under seal on August 17, 2016 (ECF No. 21), and  
15 the undersigned conducted the hearing on August 24, 2016. Plaintiff appeared telephonically,  
16 representing himself. Defendants were represented by Deputy Attorney General Heather Zana,  
17 who appeared in person. NDOC Medical Director Dr. Romeo Aranas and NDOC Pharmacy  
18 Director Linda Fox appeared telephonically. The court heard from the parties, and issues this  
19 Report and Recommendation.

## 20 **II. LEGAL STANDARD**

21 Rule 65 of the Federal Rules of Civil Procedure provide that a "court may issue a  
22 preliminary injunction only on notice to the adverse party." Fed. R. Civ. P. 65(a)(1).

23 The purpose of a preliminary injunction or temporary restraining order is to preserve the  
24 status quo if the balance of equities so heavily favors the moving party that justice requires the  
25 court to intervene to secure the positions until the merits of the action are ultimately determined.  
26 *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). A preliminary injunction is an  
27 "extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren*, 553 U.S.  
28 674, 689-90 (2008) (citations omitted). Instead, in every case, the court "must balance the

1 competing claims of injury and must consider the effect on each party of the granting or  
 2 withholding of the requested relief.” *Winter v. Natural Resources Defense Council, Inc.*, 555  
 3 U.S. 7, 23 (2008) (internal quotation marks and citation omitted). The instant motion requires  
 4 that the court determine whether Plaintiff has established the following: (1) he is likely to  
 5 succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary  
 6 relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest.  
 7 *Id.* at 20 (citations omitted).

8 The Prison Litigation Reform Act (PLRA) mandates that prisoner litigants satisfy  
 9 additional requirements when seeking preliminary injunctive relief against prison officials. The  
 10 PLRA provides, in relevant part:

11 Preliminary injunctive relief must be narrowly drawn, extend no further than  
 12 necessary to correct the harm the court finds requires preliminary relief, and be  
 13 the least intrusive means necessary to correct that harm. The court shall give  
 substantial weight to any adverse impact on public safety or the operation of a  
 criminal justice system caused by the preliminary relief and shall respect the  
 principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief.

14 18 U.S.C. § 3626(a)(2). Thus, § 3626(a)(2) limits the court’s power to grant preliminary  
 15 injunctive relief to inmates. *See Gilmore v. People of the State of California*, 220 F.3d 987, 998  
 16 (9th Cir. 2000). “Section 3626(a)...operates simultaneously to restrict the equity jurisdiction of  
 17 federal courts and to protect the bargaining power of prison administrators-no longer may courts  
 18 grant or approve relief that binds prison administrators to do more than the constitutional  
 19 minimum.” *Id.* at 999.

### 20 **III. DISCUSSION**

21 First, Plaintiff must establish a likelihood of success on the merits of his Eighth  
 22 Amendment claim.

23 A prisoner can establish an Eighth Amendment violation arising from deficient medical  
 24 care if he can prove that prison officials were deliberately indifferent to a serious medical need.  
 25 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A claim of deliberate indifference requires an  
 26 examination of two elements: the seriousness of the prisoner's medical need and the nature of the  
 27 defendant's response to that need. *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *rev'd*  
 28 *on other grounds*, *WMX Tech, Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997); *see also Akhtar v.*

1 *Mesa*, 698 F.3d 1202, 1213 (9th Cir. 2012) (quoting *Jett v. Penner*, 439 F.3d 1091, 1096 (9th  
2 Cir. 2006)). "A 'serious' medical need exists if the failure to treat a prisoner's condition could  
3 result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *McGuckin*,  
4 974 F.2d at 1059 (citing *Estelle*, 429 U.S. at 104); *see also Akhtar*, 698 F.3d at 1213. Examples  
5 of conditions that are "serious" in nature include "an injury that a reasonable doctor or patient  
6 would find important and worthy of comment or treatment; the presence of a medical condition  
7 that significantly affects an individual's daily activities; or the existence of chronic and  
8 substantial pain." *McGuckin*, 974 F.2d at 1059-60; *see also Lopez v. Smith*, 203 F.3d 1122, 1131  
9 (9th Cir. 2000) (citation omitted) (finding that inmate whose jaw was broken and mouth was  
10 wired shut for several months demonstrated a serious medical need).

11 If the medical need is "serious," the plaintiff must show that the defendant acted with  
12 deliberate indifference to that need. *Estelle*, 429 U.S. at 104; *Akhtar*, 698 F.3d at 1213 (citation  
13 omitted). deliberate indifference is only present when a prison official "knows of and disregards  
14 an excessive risk to inmate health or safety; the official must both be aware of the facts from  
15 which the inference could be drawn that a substantial risk of serious harm exists, and he must  
16 also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *see also Akhtar*, 698  
17 F.3d at 1213 (citation omitted).

18 Deliberate indifference exists when a prison official "den[ies], delay[s] or intentionally  
19 interfere[s] with medical treatment, or it may be shown by the way in which prison officials  
20 provide medical care." *Crowley v. Bannister*, 734 F.3d 967, 978 (9th Cir. 2013) (internal  
21 quotation marks and citation omitted). "[A] prisoner need not prove that he was completely  
22 denied medical care' in order to prevail" on a claim of deliberate indifference. *Snow v. McDaniel*,  
23 681 F.3d 978, 987 (9th Cir. 2012) (quoting *Lopez*, 203 F.3d at 1132), *overruled on other*  
24 *grounds*, *Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014). Where delay in receiving medical  
25 treatment is alleged, a prisoner must demonstrate that the delay led to further injury. *McGuckin*,  
26 974 F.2d at 1060.

27 Here, it is uncontested that Plaintiff suffers from various severe medical conditions,  
28 including a cardiac condition and (at least at one point) elevated cholesterol. The question, then,

1 is whether Plaintiff has shown a likelihood of success with respect to his claim that Defendants  
2 knew of and disregarded a serious risk to his health related to his receipt of medication.

3 It is undisputed that Plaintiff suffered a heart attack in May of 2015. Plaintiff attributes  
4 this to the lack of cholesterol treatment by Dr. Donnelly, but also to NDOC's failure to refill his  
5 prescriptions on time, leaving him without his prescribed medications for days, and even up to a  
6 week, at a time. There is evidence in the record that following his heart attack there have been  
7 occasions where Plaintiff has not received his medications on time.

8 For example, Plaintiff sent a request for refills of six medications on December 24, 2015.  
9 (ECF No. 21-1.) In response, he was advised: "Dr. renewed all of your meds on 12-10-15. We  
10 will look into why you have not gotten them. You should not be due until 1-6-16 according to  
11 your last KOP<sup>2</sup> pick-up. So they should be available at that time." (ECF No. 21-1 at 19.) On  
12 January 8, 2016, two days after he had been advised that his medications should be available to  
13 pick up, he sent another request: "Please be advised. I'm out of the following meds again:  
14 Chlorpheniramine 4mg; Aspir-Low 81mg; Clopidogrel 75 mg; Lovastatin 20 mg. How long can I  
15 safely go without them? It's been 4 days!" (ECF No. 21-1 at 18.) The response states: "SEE  
16 Original order. 12/10/15-2nd Req." (*Id.*) Plaintiff sent another request on January 13, 2016: "I've  
17 been out of my meds except for Atenolol & Carvedilol since 1-4-16. Is this life threatening or  
18 dangerous to my health? Lovastatin. Aspir-Low- Clopidogrel?" (ECF No. 21-1 at 17.) According  
19 to Ms. Fox, the data she accessed (which may have been different than that provided to the court)  
20 indicates that the prescriptions were filled on January 10, 2016, even though Plaintiff had  
21 inquired about the medications on December 24, 2015 and January 8, 2016. There is a notation  
22 on Plaintiff's January 13, 2016 request, stating that the medications were sent from the pharmacy  
23 on January 12, 2016. (*Id.*) There is a notation in Plaintiff's KOP medication log showing Plaintiff  
24 did not sign as having received the medication until January 15, 2016. (ECF No. 21-3 at 4.)

25 Therefore, while Plaintiff submitted a request for medications, and was advised he would  
26 have them by January 6, 2016 (when according to the medical department he was set to run out),  
27 he did not receive them until nine days later, on January 15, 2016.

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28 <sup>2</sup> "KOP" refers to an inmate's "keep-on-person" medications.

1 Dr. Aranas acknowledged during the hearing that it is important that Plaintiff receive and  
2 take his heart medications in light of the stents placed following his heart attack. Therefore, it is  
3 reasonable to conclude that a failure to timely deliver his medications is likely to lead to further  
4 injury.

5 Insofar as he must establish that Defendants knew of and disregarded a serious risk to his  
6 health in failing to ensure his medications reach him on time, there is evidence in the record that  
7 Plaintiff grieved the delay in receiving his medications on multiple occasions, advising them of  
8 his prior heart attack, but still experienced issues getting his medication on time. (*See* ECF No.  
9 3:16-cv-00371-MMD-WGC.) In addition, the delay in receipt of the medications from the  
10 pharmacy in the December 2015 to January 2016 timeframe was acknowledged in a response to  
11 an informal level grievance Plaintiff filed, with the statement: “we have little control over the  
12 delivery time from southern Nevada.” (ECF No. 21-10 at 2-6.) This statement was made even  
13 though, as Judge Du pointed out, the medical director is responsible for pharmacy services and  
14 policies. (*See* ECF No. 17 at 5, citing [http://doc.nv.gov/About/Medical\\_Division/Home/](http://doc.nv.gov/About/Medical_Division/Home/).)

15 Plaintiff has also demonstrated he will likely suffer irreparable harm in the absence of  
16 injunctive relief. He has presented evidence that there have been occasions where he has not  
17 timely received his medication, and it is undisputed that it is important that he timely receive his  
18 medications. Moreover, Plaintiff indicated that just knowing he has been without his medication  
19 for days causes him stress, particularly if he is experiencing other physical symptoms.

20 At the hearing, Ms. Fox advised the court that a new software system had been  
21 implemented in May of 2016 for the NDOC central pharmacy, whereby nurses at any NDOC  
22 institution may enter refills directly into the computer which are then sent to the pharmacy and  
23 enables the pharmacy to monitor when the refills are filled, shipped and received at the  
24 institution. She indicated that this system has and will continue to greatly improve the  
25 pharmacy’s service. Ms. Fox gave assurances that the system implemented by the pharmacy in  
26 May 2016 is a vast improvement on the prior system for processing refills and should operate to  
27 assure Plaintiff receives his prescriptions in a timely fashion. Ms. Fox and Dr. Aranas also  
28 advised the court that the prison is working on implementing a kiosk system that will make it



1 easier for inmates to request refills and for the pharmacy and medical staff to keep track of those  
2 requests.

3 While the court is encouraged by the developments NDOC's medical division and  
4 pharmacy department have implemented and are going to implement, Ms. Fox confirmed that  
5 prior to implementation of the new system in May 2016, and even with its implementation, there  
6 are no formal written procedures in place for the processing and administration of inmate refill  
7 requests. Ms. Fox stated with some confidence that with the new system, there is a three to four  
8 day process time on the pharmacy end for refills once a nurse has entered a refill into the system.  
9 The only formal policy currently in place with respect to refills is Administrative Regulation  
10 (AR) 635.12, which requires an inmate to submit a request for a refill no sooner than ten days  
11 and no later than seven days prior to the time the inmate will run out of medication. (*See* ECF  
12 No. 21-11 at 3.) No one from NDOC spoke to any policies (formal or otherwise) that are in place  
13 concerning the handling and administration of prescriptions by the medical staff, either on the  
14 front end (when the inmate requests a refill) or on the back end (after the institution receives the  
15 shipment from the pharmacy and when it is given to the inmate). Further, Dr. Aranas indicated  
16 that as the system currently operates (without the pending kiosk system for requesting refills),  
17 inmate refill requests sometimes get lost or are not delivered.

18 This leaves the court with no assurance that even if Plaintiff timely placed his requests  
19 for refills (which it appears he has consistently done in the past), that they would be promptly  
20 communicated to the pharmacy and then timely delivered to him by his housing institution upon  
21 receipt of the refills from the pharmacy.

22 Therefore, even with implementation of the new software system by the pharmacy,  
23 Plaintiff has still demonstrated a likelihood of suffering irreparable harm in the absence of  
24 injunctive relief.

25 Next, the court finds that the balance of equities tips in Plaintiff's favor because, as Judge  
26 Du pointed out, and as was confirmed at the hearing, while he complies with the prison's  
27 procedure concerning refill requests, Plaintiff does not always receive his medication in a timely  
28 manner.



1 Finally, the court finds it is in the public interest that Defendants ensure that Plaintiff  
2 receives his prescribed medications in a timely manner.

3 In sum, the court finds Plaintiff has satisfied the prerequisites for injunctive relief and  
4 recommends that Plaintiff's request for a preliminary injunction be granted.

5 Federal Rule of Civil Procedure 65(c) allows the court to "issue a preliminary injunction  
6 ... only if the movant gives security in an amount that the court considers proper to pay the costs  
7 and damages sustained by any party found to have been wrongfully enjoined[.]" "Rule 65(c)  
8 invests the district court 'with discretion as to the amount of security required, *if any*.'" *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003) (quoting *Barahona-Gomez v. Reno*,  
9 167 F.3d 1228, 1237 (9th Cir. 1999)). The court has discretion to dispense with the security  
10 requirement where it would effectively deny access to judicial review, *Save Our Sonoran, Inc. v.*  
11 *Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005) (citation omitted), or where the plaintiff is  
12 indigent, *V.L. v. Wagner*, 669 F.Supp.2d 1106, 1123 (N.D. Cal. 2009). As an indigent litigant,  
13 Plaintiff should not be required to post security.  
14

#### 15 **IV. RECOMMENDATION**

16 **IT IS HEREBY RECOMMENDED** that Plaintiff's Motion for Preliminary Injunction  
17 (ECF No. 1-3) be **GRANTED**, as follows:

18 Plaintiff is still required, consistent with AR 635.10, to request his medication refills by  
19 submitting a kite to the infirmary/clinic up to ten days (and no later than seven days) before he is  
20 set to run out of his medications. Defendants shall ensure that the refill is promptly entered into  
21 the new system described by Ms. Fox, and the pharmacy shall promptly process the refill and  
22 ship it to the institution where Plaintiff is housed. Defendants shall then ensure that when the  
23 medication is received by the institution that it is promptly delivered to Plaintiff. The use of the  
24 term "prompt" shall be construed in light of Ms. Fox's statement to the court that the time it  
25 should take from when a refill is requested and entered into the system and received by the  
26 inmate is three to four days.

1 Plaintiff should be required to keep documentation of his refill requests, and if  
2 Defendants fail to timely provide Plaintiff within his medication refills, Plaintiff should be  
3 permitted to move the court for monetary sanctions against Defendants.

4 This preliminary injunction should apply to the Defendants named in this action and their  
5 officers, agents, servants, employees and attorneys. Fed. R. Civ. P. 65(d)(2)(A), (B).

6 The preliminary injunction should remain in place pending a full determination of  
7 Plaintiff's claims upon the merits or upon further order of the court.

8 **IT IS FURTHER RECOMMENDED** that the TRO granted by District Judge Du be  
9 extended while this Report and Recommendation is pending.

10 The parties should be aware of the following:

11 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to  
12 this Report and Recommendation within fourteen days of receipt. These objections should be  
13 titled "Objections to Magistrate Judge's Report and Recommendation" and should be  
14 accompanied by points and authorities for consideration by the district judge.

15 2. That this Report and Recommendation is not an appealable order and that any notice of  
16 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
17 until entry of judgment by the district court.

18 DATED: August 26, 2016.

19   
20 WILLIAM G. COBB  
21 UNITED STATES MAGISTRATE JUDGE  
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